Antitrust Update

Practical Guidance for Navigating Evolving Risks

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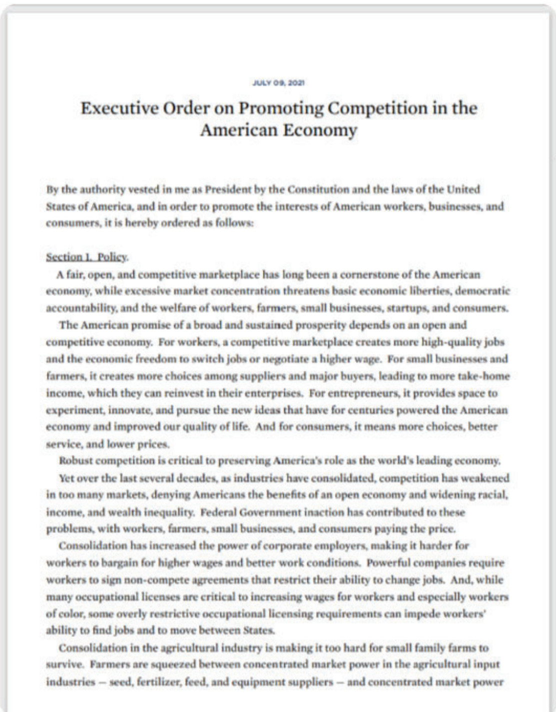


JULY 09, 2021

Executive Order on Promoting Competition in the American Economy

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote the interests of American workers, businesses, and consumers, it is hereby ordered as follows:

Section 1. Policy.

A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.

The American promise of a broad and sustained prosperity depends on an open and competitive economy. For workers, a competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage. For small businesses and farmers, it creates more choices among suppliers and major buyers, leading to more take-home income, which they can reinvest in their enterprises. For entrepreneurs, it provides space to experiment, innovate, and pursue the new ideas that have for centuries powered the American economy and improved our quality of life. And for consumers, it means more choices, better service, and lower prices.

Robust competition is critical to preserving America's role as the world's leading economy.

Yet over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality. Federal Government inaction has contributed to these problems, with workers, farmers, small businesses, and consumers paying the price.

Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions. Powerful companies require workers to sign non-compete agreements that restrict their ability to change jobs. And, while many occupational licenses are critical to increasing wages for workers and especially workers of color, some overly restrictive occupational licensing requirements can impede workers' ability to find jobs and to move between States.

Consolidation in the agricultural industry is making it too hard for small family farms to survive. Farmers are squeezed between concentrated market power in the agricultural input industries – seed, fertilizer, feed, and equipment suppliers – and concentrated market power

Whole-of Government Competition Policy

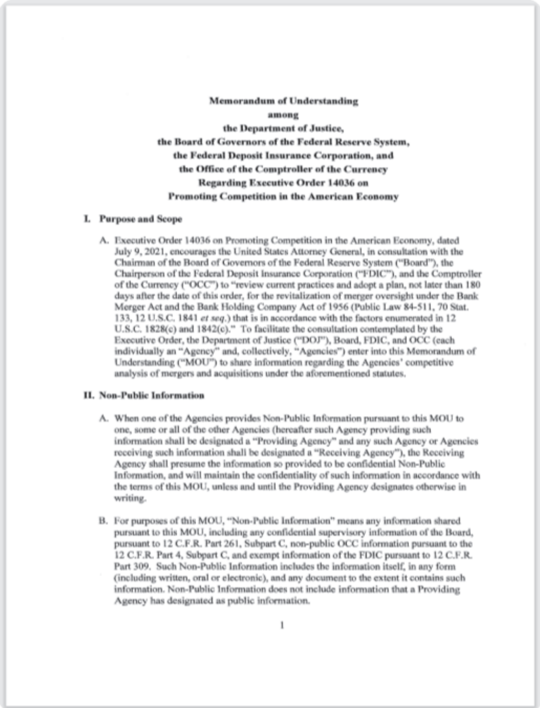
Industries under scrutiny

- Labor markets
- Agricultural markets
- Internet platform industries
- Healthcare markets
  - Insurance
  - Hospitals
  - Prescription drugs
- Beer, wine, and spirits markets
- Real estate
- Repair markets
- Airlines
- Communications (e.g., broadband & spectrum)
- Rail industry
- Defense industrial base
- Consumer financial data

Issues in the spotlight

- Excessive concentration
- Abuses of market power
  - Monopoly
  - Monopsony

Enforcement Agencies



Memorandum of Understanding
among
the Department of Justice,
the Board of Governors of the Federal Reserve System,
the Federal Deposit Insurance Corporation, and
the Office of the Comptroller of the Currency
Regarding Executive Order 14036 on
Promoting Competition in the American Economy

I. Purpose and Scope

A. Executive Order 14036 on Promoting Competition in the American Economy, dated July 9, 2021, encourages the United States Attorney General, in consultation with the Chairman of the Board of Governors of the Federal Reserve System ("Board"), the Chairperson of the Federal Deposit Insurance Corporation ("FDIC"), and the Comptroller of the Currency ("OCC") to "review current practices and adopt a plan, not later than 180 days after the date of this order, for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956 (Public Law 84-511, 70 Stat. 133, 12 U.S.C. 1841 *et seq.*) that is in accordance with the factors enumerated in 12 U.S.C. 1828(c) and 1842(c)." To facilitate the consultation contemplated by the Executive Order, the Department of Justice ("DOJ"), Board, FDIC, and OCC (each individually an "Agency" and, collectively, "Agencies") enter into this Memorandum of Understanding ("MOU") to share information regarding the Agencies' competitive analysis of mergers and acquisitions under the aforementioned statutes.

II. Non-Public Information

A. When one of the Agencies provides Non-Public Information pursuant to this MOU to one, some or all of the other Agencies (hereafter such Agency providing such information shall be designated a "Providing Agency" and any such Agency or Agencies receiving such information shall be designated a "Receiving Agency"), the Receiving Agency shall presume the information so provided to be confidential Non-Public Information, and will maintain the confidentiality of such information in accordance with the terms of this MOU, unless and until the Providing Agency designates otherwise in writing.

B. For purposes of this MOU, "Non-Public Information" means any information shared pursuant to this MOU, including any confidential supervisory information of the Board, pursuant to 12 C.F.R. Part 261, Subpart C, non-public OCC information pursuant to the 12 C.F.R. Part 4, Subpart C, and exempt information of the FDIC pursuant to 12 C.F.R. Part 309. Such Non-Public Information includes the information itself, in any form (including written, oral or electronic), and any document to the extent it contains such information. Non-Public Information does not include information that a Providing Agency has designated as public information.

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DEPARTMENT OF JUSTICE

FEDERAL TRADE COMMISSION

Department of the Treasury

Department of Agriculture

Department of Health and Human Services

Office of Inspector General

Department of Labor

National Labor Relations Board

Department of Transportation

Federal Reserve System

Securities and Exchange Commission

Federal Deposit Insurance Corporation

Office of the Comptroller of the Currency

Federal Communications Commission

Federal Maritime Commission

Commodity Futures Trading commission

Federal Energy Regulatory Commission

Consumer Financial Production Bureau

Surface Transportation Board

So what have they done?

Expanded interpretation of Section 5 of the FTC Act

Proposed a rule to ban non-competes

Announced intent to seek criminal penalties for monopolization

Withdrawn safe harbors for information exchanges

Resurgence of Robinson-Patman Act

Focused in on private equity

Aggressive merger enforcement agenda
- Hart-Scott-Rodino violations
- Divestitures
- Active slate of cases

Section 5's "Incipient Violation"

1914 STATUTE

Prohibits "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce"

2015 POLICY

- "Consumer" welfare
- Rule of reason
- Challenged conduct "must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications"

2022 POLICY

- "Consumers, workers or other market participants"
- "[T]he inquiry will not focus on the "rule of reason"
- "Instead" stop "unfair methods of competition in their incipiency based on their tendency to harm competitive conditions"

Microsoft/Activision Acquisition

Vertical transaction challenged by FTC

Content foreclosure/raising rivals' costs

Section 5 claim

- "mergers, acquisitions or joint ventures that have the tendency to ripen into violations of the antitrust laws. . ."
- "mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition. . ."

Takeover blocked by UK antitrust authority on April 26th; still under EU scrutiny

Title search: Antitrust Update: Practical Guidance for Navigating Evolving Risks

Also available as part of the eCourse
2023 Corporate Counsel eConference

First appeared as part of the conference materials for the
45th Annual Corporate Counsel Institute session
"Antitrust Update: Practical Guidance for Navigating Evolving Risks"